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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MAY 24 1985

MEMORANDUM FOR THE SENIOR AGENCY OFFICIALS FOR INFORMATION RESOURCES MANAGEMENT

FROM: Robert P. Bedell
Deputy Administrator
Office of Information and Regulatory Affairs

SUBJECT: Privacy Act Guidance - Update

Section (6) of the Privacy Act of 1974 requires OMB to issue "guidelines and regulations" to help the agencies implement the Act's provisions. We issued comprehensive Guidelines in 1975 and have updated them on an ad hoc basis since then. In 1983, at oversight hearings before the House Subcommittee on Government Information, Justice and Agriculture, the then Administrator of the Office of Information and Regulatory Affairs, Christopher DeMuth, testified that we were working on a comprehensive update of that guidance to consolidate the existing pieces and to make it conform to the case law that had evolved.

While we are, in fact, working on such a wholesale revision, there are three specific areas that deserve your immediate attention. Some recent court decisions and congressional action have called into question our existing guidance in the following areas:

1. Agencies' disclosures of personal information from systems of records during the course of litigation.

2. The disclosure of personal information from Privacy Act files pursuant to Section (b)(2), which allows agencies to make non-consensual disclosures if the disclosure would be "required" under the Freedom of Information Act.

3. The relationship between the exemption provisions of the Privacy Act and those of the Freedom of Information Act.

The attachment to this memorandum discusses each of these areas and suggests specific remedial steps your agency can take. You should take action as quickly as possible.

To help speed things along, copies of this memorandum have been sent to your agency's Privacy Act Officer and Office of the General Counsel. Please refer any questions to Robert N. Veeder of my staff at 395-4814 or Cecelia Wirtz of our General Counsel's office at 395-5600.

Attachment

Office of Management and Budget
Office of Information and Regulatory Affairs

Privacy Act Guidance Updated

This document identifies three areas in which agencies should amend their practices to conform to new interpretations of the Privacy Act which have resulted from recent congressional action or judicial interpretations.

In each case, we identify the problem, provide background, and offer a recommendation for agency action to mitigate the effects of the problem.

1. Problem - Disclosures of Privacy Act material during litigation.

A recent D.C. District Court decision has called into question the legality of the "routine use" Federal Bureau of Investigation relies upon to disclose individually identifiable information in the course of litigation. By extension, this problem confronts not only the FBI, but potentially many other agencies, as well.

a. Background

The Privacy Act requires agencies to obtain the written consent of record subjects before disclosing their records from agency systems of records. It also provides 12 specific exceptions to this requirement. For disclosures during litigation, agencies generally rely on the following two exceptions:

- Subsection (b)(11), "pursuant to the order of a court of competent jurisdiction;" or

- Subsection (b)(3), for a "routine use." The "routine use" exception provides that an agency may make a nonconsensual disclosure for a routine use that is compatible with the purpose for which it collected the information. An example is the disclosure of time and attendance information from an agency to the Treasury Department to permit the Treasury to issue checks to the agency's employees.

Disclosures initiated by the government generally take place as routine use exceptions.

In Krohn v. Department of Justice, Civil No. 78-1536 (D.D.C., Mar. 19, 1984), Judge Harold Greene ruled that an FBI routine use that provided for disclosure "during appropriate legal proceedings" was "vague and capable of being construed so broadly as to encompass all legal

proceedings...[and] would make disclosure as a 'routine use' the rule rather than the exception and thus subvert the purposes of the Act."

In holding that the Justice Department acted improperly in disclosing records pursuant to this routine use, Judge Greene opened the door for Krohn to collect damages from the Department. (Note: Judge Greene reversed himself on Krohn's eligibility for damages, deciding that the disclosure was not "wilful or intentional" since the Department acted in good faith on what it thought to be a valid routine use).

As a result of Krohn, OMB selectively reviewed agencies' existing routine uses for disclosures in support of litigation and found that many could be improved substantially.

b. Recommended Agency Action

Agencies should adopt better routine uses to support disclosures of Privacy Act records during litigation; none of the other disclosure exceptions found in Section (b) will serve. Nor is it likely that a record subject would provide written consent for such disclosures. Such routine uses should be adopted uniformly by the agencies and applied across the board to all of their systems of records.

To be effective, such routine uses must accommodate the following concerns:

- o They should not be so narrowly drawn so as to restrict the flow of relevant and necessary information;

- o They should be narrowly enough drawn to meet Judge Greene's concern that "the threat of the government's unrestricted ability to disclose personal and embarrassing material as part of or in retaliation for suit being brought against it could discourage meritorious claims from being filed." Laningham v. United States Navy, (Civil No. 83-3238, D.D.C., Sep 25, 1984).

- o They must address the issue of compatibility by incorporating a statement that any disclosures of information will be compatible with the purpose for which the agency collected the information. Agencies, of course, will have to establish procedures to verify such compatibility before disclosing pursuant to this use.

We urge that the agencies, therefore, adopt the following routine uses for each of their systems:

Routine Use for Disclosure to the Department of Justice for Use in Litigation:

"It shall be a routine use of the records in this system of records to disclose them to the Department of Justice when

(a) the agency, or any component thereof; or

(b) any employee of the agency in his or her official capacity; or

(c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or

(d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components,

is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected."

Routine Use for Agency Disclosure in Litigation:

"It shall be a routine use of records maintained by this agency to disclose them in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when

(a) the agency, or any component thereof; or

(b) any employee of the agency in his or her official capacity; or

(c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or

(d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components,

is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected."

Before disclosing pursuant to either of these routine uses, agencies should thoroughly review any proposed disclosures for conformance with the provisions of the routine use and any other applicable provisions of the Privacy Act, e.g., section (e)(6). This review must support a finding that the proposed disclosure is compatible with the underlying purpose of the original collection of the data. In any case, the records disclosed should be only those directly necessary and relevant to support the litigation.

2. Problem - Disclosures pursuant to Section (b)(2).

The Court of Appeals for the D.C. Circuit recently ruled that before disclosing records pursuant to section (b)(2) of the Privacy Act, agencies must have a Freedom of Information Act request in hand.

a. Background

Section (b)(2) of the Privacy Act permits agencies to make nonconsensual disclosures of information from systems of records if those disclosures would be required under the Freedom of Information Act.

In Bartel v. Federal Aviation Administration, et. al. 725 F.2d 1403 (D.C. Cir. 1984), the court interpreted section (b)(2) to mean that an agency may not make a "nonconsensual disclosure of Privacy Act material unless the agency acts pursuant to a FOIA request." In comparing the two acts, the court noted that while the Freedom of Information Act was intended to limit "agency discretion to deny public access to information in its files," the Privacy Act was designed "to limit agency discretion to reveal personal information in its files." If the (b)(2) exception were read to permit agencies to disclose, at will, from their systems without a triggering mechanism such as a FOIA request, it would effectively increase agency discretion "to disclose information where disclosure is otherwise prohibited by

the Privacy Act." The court found that such an interpretation would be inconsistent with the thrust of the Privacy Act, which is to limit agency discretion.

The correct interpretation, according to the court, is that it is only "when the agency is faced with a FOIA request for information that is not within a FOIA exemption, and therefore has no discretion but to disclose the information, does the FOIA exception to the Privacy Act come into play."

The court also cited the OMB Implementing Guidelines in support of its interpretation, but misinterpreted them in a key way. The problem lies with the court's analysis of the "Disclosure to the Public" section of the Guidelines which overlooks the distinction made between mandatory versus discretionary releases made under the FOIA. The Guidelines advise that "[G]iven the use of the term 'required', agencies may not voluntarily make public any record which they are not required to release (i.e., those they are permitted to withhold) without the consent of the individual unless that disclosure is permitted under one of the other portions of this subsection." This sentence simply means that records which fall within one of the nine FOIA exemptions may not be released under (b)(2) of the Privacy Act. The section does not state, nor was it intended to imply, that an actual FOIA request is required to release records that would be subject to mandatory release under the FOIA.

Contrary to the court's reasoning, this approach does not increase agency discretion to disclose information where disclosure is otherwise prohibited by the Privacy Act. What it does is clarify that the two statutes must be read in tandem on this issue. Most importantly, it maintains the status quo: no information is released which would not otherwise be required to be released under the FOIA.

If read as broadly as possible, the Bartel decision could prohibit the nonconsensual disclosure of all kinds of records traditionally treated as being in the public domain. These include, for example, agency telephone directories compiled from personnel systems of records, press releases on employee accomplishments, etc.

It should be noted that Judge Wald acknowledged but declined to address the issue of information traditionally thought to be in the public domain, and whether such information could be released without a FOIA request in hand. Our guidance below aims at providing insight into this area. By doing so, however, we do not mean to suggest that we think the Bartel opinion is otherwise correct.

b. Recommended Agency Action

In an attempt to clarify what may be released under (b)(2) without an actual FOIA request in hand, we offer the following interpretation:

> "Subsection (b)(2) is intended to "preserve the status quo as interpreted by the courts regarding the disclosure of personal information" to the public under the Freedom of Information Act. (Congressional Record p. S21817, December 17, 1974 and p. H12244, December 18, 1974). It absolves an agency from having to obtain the consent of an individual before disclosing a record about him or her to a member of the public to whom the agency is required to disclose such information under the Freedom of Information Act. The use of the term "required" indicates that agencies may not rely upon (b)(2) to make public any record which the FOIA permits them to withhold. Thus, an agency's initial action in contemplating a (b)(2) disclosure should be to evaluate the disclosure in terms of each exemption provision of the Freedom of Information Act. If it is satisfied that no exemption could be applied and that the disclosure would thus be "required" under the FOIA, it may disclose pursuant to Section (b)(2) of the Privacy Act.
>
> The question of whether an agency must have a FOIA request in hand before disclosing pursuant to (b)(2) turns on the character of the records in question. Agencies may continue to disclose, without a specific FOIA request for them, records traditionally held to be in the public domain or which are required to be disclosed to the public such as many of the final orders and opinions of quasi-judicial agencies, press releases, telephone directories, organizational charts, etc. Records which fall outside the scope of this category should not be disclosed pursuant to (b)(2) without a FOIA request in hand, even if the agency would be required to disclose them pursuant to such a request. Where appropriate, however, agencies may disclose such records by obtaining the record subject's consent, or by relying on the other disclosure exceptions in section (b) of the Privacy Act, such as the routine use provision."

3. Problem - The Relationship between the Privacy Act and the Freedom of Information Act.

Guidance we issued in March of this year on the relationship between the Freedom of Information Act and

the Privacy Act has been invalidated by enactment of H.R. 5164 (P.L. 98-477).

a. Background

Section (b)(3) of the Freedom of Information Act permits the withholding of records in response to a FOIA request if such withholding is permitted by another statute the terms of which conform to the narrow and specific provisions of Section (b)(3).

Our original guidance on the relationship between the Privacy Act and the FOIA urged the agencies not to treat the Privacy Act as a FOIA exemption (3) statute. Agencies were instructed to consider access requests from record subjects under both acts and to provide access under the act that gave the greatest amount of information.

Starting in 1980, however, after lengthy analysis, the Department of Justice took the position in litigation that the Privacy Act was indeed a FOIA (b)(3) statute. This meant that agencies could use an applicable Privacy Act exemption to deny a record subject access if he made his request under the FOIA. On March 29, 1984, to conform our guidance on the issue to the Government's litigating position, we published a change to our original guidance in the Federal Register.

The circuits split on the issue, with the Third and D.C. Circuits rejecting the Government's argument and the Fifth and Seventh agreeing that the Privacy Act is a (b)(3) statute. The issue was on the Supreme Court's calendar for Spring of 1985.

Before the court could act, however, the Congress passed H.R. 5164 (P.L. 98-477), which contained a section amending the Privacy Act by adding Section (q)(2), which instructs agencies that they may not rely on a Privacy Act exemption to deny a record subject access to his records under the FOIA.

b. Recommended Agency Action

In responding to an individual's request for access to records about him that an agency is maintaining in a Privacy Act system of records, agencies should follow the guidance below which amends the guidance we published on March 29, 1984 (49 FR 12338):

P.L. 98-477, added Section (q)(2) to the Privacy Act so that the entire section now reads as follow:

"Section (q). Effect of Other Laws. Relationship of the Privacy Act to the Freedom of Information Act."

"Subsection (q)(1). No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

Subsection (q)(2). No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title."

The two provisions of this section work together to forbid agencies from (a) relying on a Freedom of Information Act exemption to deny an individual access to records to which he is entitled under the Privacy Act, and (b) relying on a Privacy Act exemption to deny access to records accessible under the FOIA.

Subsection (q)(2) was added to the Privacy Act in 1984 by P.L. 98-477 to make it clear that the Privacy Act is not a FOIA exemption (b)(3) statute. Section (b)(3) of the FOIA permits agencies to withhold records sought under that statute if the material is specifically barred from disclosure by another statute.

The effect of section (q)(2) is to make the access exemptions of the Privacy Act unavailable to an agency when it processes a record subject's FOIA request for access to records maintained in a Privacy Act system of records. In order to withhold records in response to such requests, agencies can only rely on an applicable FOIA exemption.

Similarly, section (q)(1), which was an original provision of the Privacy Act, has always prohibited agencies from using a FOIA exemption to deny an individual access to a record about him that is otherwise accessible under the Privacy Act.

Whether agencies should process a request by an individual for access to his or her record under Privacy Act or Freedom of Information Act procedures depends upon how the requester couches the request. The following examples assume that an individual, as defined by the Privacy Act, has asked for access to records about himself that an agency is maintaining in a system of records:

- The request cites the Privacy Act. In this situation, the agency would process the request under the Privacy Act and apply, if appropriate, any applicable Privacy Act exemption. The agency would adhere to the fee provisions, time limitations, and appeal processes that are either required by the Privacy Act or by the agency's Privacy Act regulation.

- The request cites the FOIA. Here, the agency would process the request under the provisions of the FOIA and apply, as appropriate, any applicable FOIA exemption. The agency would adhere to the fee, time, and administrative appeal requirements of the FOIA and its own implementing regulation.

- The request cites both the Privacy and Freedom of Information Acts, or it cites no Act at all. In responding to either of these requests, the agency must process the request under both Acts. This dual processing is required in response to the first kind of request because the individual has cited both Acts specifically. It is required under the second kind of request (no Act cited), because the request meets the statutory terms of both a FOIA and a Privacy Act request. The effect of processing under both Acts is that the agency, in applying any access restrictions, is forced to rely on the weakest exemption available, generally a FOIA exemption. For requests which are processed under the provisions of both Acts, agencies should follow the Privacy Act's fee provisions and charge requesters only for the cost of reproduction and not for search since the records are maintained in systems of records and should be readily available. As to time limits, agencies should follow the FOIA time limits in processing dual requests.